84-1120 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

COMMITTEE ON PROFESSIONAL STANDARDS,
Petitioner,

v.

ERIC P. VON WIEGEN, ATTORNEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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CORRECTED COPY

New York State Committee on Professional Standards, Third Judicial Department, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York.

Question Presented.

1. May a state, consistent with the First Amendment and this Court's decisions on lawyer advertising, prohibit direct mailing to accident victims in order to solicit employment for representation in personal injury actions?

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PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The decision of the New York Court of Appeals, finding direct mail solicitation of accident victims did not violate New York State Judiciary Law Section 479 and Disciplinary Rule DR2-103(A) of the Code of Professional Responsibility, is reported at 63 N.Y. 2d 163 (1984).

Jurisdiction.

The judgment of the New York Court of Appeals was entered on October 16, 1984. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1257(3).

Statutes Involved.

New York State Judiciary Law Section 479 provides:

> It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

Also DR2-103(A) of the Code of Professional Responsibility adopted by the New York Courts provides:

> A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or an associate to a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR2-104 and advertising in accordance with DR2-101 shall not be deemed solicitation in violation of this provision.

Statement of the Case.

Petitioner, Eric P. vonWiegen, graduated from law school in 1974 and was admitted to the Michigan Bar. On May 27, 1980, he was admitted to practice in New York as

an attorney by order of the Appellate Division, Third Department.

On July 17, 1981, a skywalk collapsed in the Hyatt Regency Hotel, killing more than 100 people and injuring more than 150 others. The accident was given widespread attention by the media. On or about July 19, 1981, respondent began to send letters to the Hyatt Regency disaster victims and their families. The letterhead thereon indicated it had been sent by a Litigation Coordinating Committee whose address was the respondent's law office and stated that the coordinating committee had been formed to protect the rights and preserve the claims of all persons injured and the families of the deceased in the Hyatt Regency disaster. A reference to "an attorney has agreed to provide legal consultation to assist any persons with questions as to their rights and possible claims arising from this incident" was in the letter without naming respondent as the attorney. It further contained an invitation for the recipient to call respondent's telephone number collect or to return or "drop a card" to Diane Frost, a temporary secretary, who was the signatory on the letter and listed as the committee coordinator.

Approximately two to three days later, respondent sent a followup letter which had in bold print "Attention Hyatt Regency Disaster Victims" again signed by Diane Frost as committee coordinator. It began by saying "Many of you have requested representation by Attorney Eric P. von-Wiegen * * *" The mailing went on to state he would represent victims on a contingency fee basis of 25% of the sum recovered after reimbursement of reasonable and necessary costs incurred in making the recovery. The costs were to be pro-rated among persons represented by von-Wiegen. The letter recited that because of respondent's experience in the practice of personal injury litigation, it was his opinion that the liability of the potential defendants

was clear. He noted he would reduce his usual and customary fee of 25% to 20% if client representation would exceed 25 persons. Again, a law office number was given, but no address. This was the first time respondent's name was mentioned and, in fact, the record of the court below supports that only a few calls had been received and no one had retained him at the time of that letter, nor did that letter establish his involvement in initiating the letters; at that time there were no additional members of the "Litigation Coordinating Committee" other than Diane Frost and himself.

On April 20, 1982, a petition of charges was filed by the petitioner instituting a disciplinary proceeding against the respondent. A referee was appointed and hearings were held October 13, October 27, and December 17, 1982. The referee rendered his report on August 18, 1983, finding in part that the respondent's actions in sending the letters did not constitute a violation of the Code; the referee did find the language was misleading. The Appellate Division, in reviewing the matter, also found that the letters contained language which was misleading and deceiving, but found further that the mailings were impermissible solicitation proscribed by Judiciary Law Section 479 and Disciplinary Rules DR2-103 of the Code of Professional Responsibility. Therein, that court recited a number of substantial interests which they felt permitted regulation of direct-mail solicitation of accident victims; they included:

(1) avoidance of the demoralizing effects such solicitation might have on the profession and the unseemly rivalry reminiscent of "ambulance chasing" it might generate;

(2) avoidance of stirring up litigation and vexacious conduct; and

(3) prevention of invasions of privacy.

The Appellate Division found direct-mail solicitation of particular accident victims was closer to prohibitable in-person solicitation than to the general mail advertising permitted in New York State by *Matter of Koffler,* 51 N.Y. 2d 140 (1981). The Appellate Division further found the references in the letters were deceptive and misleading, to wit: (1) that a litigation coordinating committee had been formed to assist the Hyatt Regency disaster victims and (2) that many accident victims and/or their families had requested representation by respondent. Based thereon plus an additional finding respondent violated a trade-name prohibition, the Appellate Division suspended respondent for a period of six months.

The case was appealed and was presented to the Court of Appeals. That court found the case was closer to *Matter of Koffler, supra,* which permitted direct-mail solicitation in general of real property owners. The Court of Appeals found that the elements of intimidation and duress which were present in *Ohralik* are not present in the case of mail solicitation. They found the restriction was content based and held that the prohibition of mail solicitation of accident victims violates the respondent's rights of expression in the First and Fourteenth Amendments in the United States Constitution. In reviewing content based restrictions, the Court relied on *Central Hudson Gas and Electric v. Public Service Commission,* 447 U.S. 530 (1980). The court found that direct-mailing solicitation of accident victims was not inherently misleading nor was there a history that the practice led to abuses. The government interests as cited by the Appellate Division were rejected by the Court of Appeals which found in addition that the mail solicitation did not constitute a substantial invasion of privacy or present a risk of undue pressure. It further found that there is no danger that litigation would be

stirred up, and finally the Court downplayed the potential for deception by finding that the use of writing and implementation of filing requirements would help sanitize statements in solicitation of personal injury cases. Based thereon, the Court found there were less drastic alternatives than a complete ban on this type of solicitation.

However, the Court of Appeals did find that respondent used misleading statements and affirmed the Appellate Division finding in that regard. The matter was remanded to the Appellate Division for reconsideration in light of that opinion. No further sanction has to date been imposed.

The permission of the Court of Appeals to solicit accident victims through the mail is contrary to the majority view of the States which have addressed this issue and fails to recognize the vulnerability of that particular group as well as potential for harm. Review by this court is therefore both necessary and appropriate.

Reasons for Granting the Writ.

This case raises important questions about the permissible scope of State regulation of attorney advertising which have heretofore been undecided by the court.

The primary decisions involving solicitation have historically been *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Ohralik v. Ohio Bar Association,* 436 U.S. 447 (1978), and *Matter of Primus,* 436 U.S. 412 (1977). *Bates* opened up the floodgates for attorney advertising and the subsequent cases have sought to narrow that ruling. *Ohralik* prohibits in-person solicitation, but *Primus* permits direct-mail solicitation when it is for interests which are beyond merely pecuniary interests; in that case, the Court found the interests of political expression and association

were the motivating factors in sending the letter to women who were being sterilized as a condition of receiving Medicaid, thus removing it from prohibited solicitation.

The more recent determination *In the Matter of R.M.J.*, 455 U.S. 191 (1982), upheld the First Amendment right of an attorney to announce the opening of a new office by mailing professional business cards to a select list of addressees which went beyond the list of individuals to whom he was permitted to send cards according to the disciplinary rule of that state.

This case differs substantially from those decisions in that it involves a mailing to targeted individuals based on specific representation proposed in a letter which contained misleading statements. The records in the aforementioned determinations were silent concerning a finding of misleading and deceiving statements. It is clear that *Bates* has not condoned the use of untruthful speech. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

The decision of the court below provides that filing is an acceptable alternative to police such statements. This rule would not be applicable if, in fact, the litigation coordinating committee had existed. Such a committee would not be obligated to file with any disciplinary agency. Thus, any attorney would simply have to hide behind a third person in order to escape this requirement.

Further, filing requirements do not assist in policing the profession sufficiently so as to permit direct mailing. The purpose of filing is to regulate fraudulent and deceptive conduct; the purpose of regulating such conduct is to prevent harm before it occurs. Generally, filings are not made prior to mailing, thus the primary purpose cannot be

met. See, *In re Shannon*, 292 Or. 339 (1982). *Central Hudson* standards require the least restrictive means of regulation, not the least restrictive imaginable; thus the respondent is not prohibited from advertising in general to notify the victims or their families through the newspaper or other public media.

The conflict among the states as to direct mailing to targeted individuals is noteworthy. The ruling by the court below is in the minority view of the states permitting direct-mail solicitation, particularly to accident victims.[1] Further, the state of the law in New York contravenes the proposed Model Code of the American Bar Association at Rule 7.3, which prohibits direct-mail solicitation for pecuniary gain. Continuity among the States is necessary for the protection of the individual recipients of such letters. See *In the Matter of R.M.J., supra*, at 204, note 16 (1982).

This court has not heretofore reviewed the question presented where an attorney solicits accident victims solely for pecuniary gain. *In re Primus*, 436 U.S. 412 (1977), involved associational interests which are not involved here; *In re R.M.J.*, 455 U.S. 191 (1982), involved mailing of general advertisements to other than a prescribed list of people. In fact, this Court has noted the vulnerability of the class of people sought to be protected. See, *Ohralik v. Ohio Bar Association*, 436 U.S. 447 (1978). Certainly the decision of the Court below has failed to recognize that privacy interests of individuals may at times be substantial so as to limit the First Amendment rights of others. See,

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[1] "Thirty-four states have followed the more restrictive 'regulatory' proposal, while most of the remaining jurisdictions have adopted rules modeled, in varying degrees, on the 'directive' approach. *See Sims, supra*, note 7, at 22. In sum, the regulatory schemes of as many as 38 states prohibit direct-mail legal advertising." Direct Mail Solicitation by Attorneys: *Bates* to *R.M.J.*, 33 Syr. L. Rev. 1041, n. 76.

Breard v. Alexandria, 341 U.S. 622 (1951); *Rowan v. Post Office Department,* 397 U.S. 728 (1970).

Only this Court can provide the guidance necessary for uniform treatment and resolution of the need to protect laypersons in mail solicitation.

I.

The Decision Below Conflicts With Other State's Decisions.

The decision of the Court of Appeals is in conflict with the majority of decisions of other states from their courts of last resort.

In Kansas, direct mail solicitation by an attorney is prohibited; *State v. Moses,* 231 Kan. 243 (1982), prohibited direct mailing of advertisements to real property owners, holding solicitation by direct mail of a stranger by an attorney for a particular matter, violates the provisions of the Code of Professional Responsibility, and is subject to discipline. Further that decision found filing requirements did not sufficiently protect the public. The Kansas Court has reiterated its decision recently in *State v. Caenen,* 235 Kan. 451 (1984).

In Indiana, *In re Frank,* 440 N.E. 2d 676 (Ind. 1982), holds solicitation of individuals by direct mail for a specific matter is "detrimental to the public and offensive to our system of justice." *Frank, supra,* at 677. That case arose out of direct mailing to individuals who had been charged with driving under the influence of alcohol and for whom no attorney appeared of record. The letter advised those individuals of the court's practices, the at-

torney's successful experience in plea bargaining such cases and his fee for this service.

In *Dayton Bar Association v. Herzog,* 70 Ohio St. 2d 261 (1982), the respondent therein had mailed between 500 and 1000 letters to defendants in the Dayton Municipal Court whose cases were in a newspaper. There were two form letters which requested the recipients to call the office. The court found that such letters violated DR2-103 because the respondent had attempted to directly solicit or attempt to solicit professional employment.

In *Adler, Barish, Daniels, Levin et al., v. Epstein,* 482 Pa. 416, *app. dism'd* 442 U.S. 907 (1978), the court, outside of a disciplinary proceeding, had occasion to comment on the direct mail activity of the defendant. In that case, the attorneys had left a large firm in order to establish their own smaller firm. They first sent announcements to former clients of the firm they had left, and thereafter mailed letters containing contingent fee retainer requests and authorization of substitution of attorneys in the form of a letter which could be returned by the recipient. The court therein found such activity frustrates rather than advances informed and reliable decision making, thus subjecting the activity to regulation and prohibition.

Other states prohibit direct-mail solicitation as a whole: *Allison v. Louisiana State Bar Association,* 362 So. 2d 489 (La. 1978), and *In re Petition for Rule of Court Governing Lawyer Advertising,* 564 S.W. 2d 638 (Tenn. 1978), or, in part, *In re Utah State Bar Petition,* 647 P. 2d 991 (Utah 1982) ("Pending our adoption of rules on that subject, the circulation of professional cards and announcements to prospective clients is permissible, subject to the provisions of Rule DR2-101, but other direct mail advertising is prohibited").

Further the decision of the Court below contravenes the ABA Model Rules of Professional Conduct. Rule 7.3 provides:

> RULE 7.3 Direct Contact with Prospective Clients
>
> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

In commenting, the ABA notes the informative nature of a general mail advertisement is lost in a targeted, importuning solicitation letter to recipients who are not unlikely vulnerable at the time of receipt.

It is thus incumbent upon this court to resolve the difference among the States regarding direct mailing to targeted individuals.

II.

This court has not Ruled on Decisions of This Nature of Attorney Solicitation.

The decisions of this court have never addressed the issue of direct mailing to targeted individuals such as accident victims.

The closest decision to the case presented for appeal herein is *In re Primus,* 436 U. S. 412 (1978). That case is easily distinguished because the letter sent by the appellant therein was not a solicitation for pecuniary gain, but rather a communication of an offer of free assistance motivated by the desire to express personal political beliefs and to advance the ideologies of the American Civil Liberties Union. In fact that case noted:

> At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose(s) a commercial transaction," *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376, 385, 93 S. Ct. 2553, 2558, 37 L.Ed. 2d 669 (1973). *See Ohralik,* 436 U.S., at 455-459, 98 S.Ct. at 1918-1920. *Primus, supra,* at 437.

In re R.M.J., supra, further fails to dispose of the issue here. In that case again the mailing consisted of benign solicitation by sending announcement cards to other than persons delineated in the rules of the Missouri Supreme Court. The cards contained no misleading information, and were general enough to be classified as mere advertisements.

Contrary to those mailings, the case at hand involves the solicitation of a targeted group with a letter which was misleading and deceiving. The letter does not relate to general fee structure for general legal work, but rather

targets a group which is vulnerable to suggestion and persuasion through an indirect means; nothing indicates the attorney's authorship and portrays a nonexistent entity which solicits the accident victim or his survivors. Nothing in the letter presents information not able to be gleaned in another manner. It is an example of those situations to which the court has made reference of permitting regulation. See, *In re R.M.J., supra; In re Primus, supra.*

Those rulings which do exist favor the review and overturning of the decision of the Court below. *Ohralik*, although an in-person solicitation issue, noted the vulnerability of this class of persons.

This court has noted: "Although it is argued that personal solicitation is valuable because it may apprise a victim of the misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence, but also may make advice all the more intrusive. Thus, under these adverse conditions, the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes." *Ohralik, supra,* at 1923. Such vulnerability mandates the protection of the privacy of those individuals from the impersonal barrage of letters from attorneys of all states. This issue has not been addressed since *Ohralik* in the direct mailing cases. Certainly there are times when First Amendment rights must be subordinated to the individual privacy of others. *See, Rowan v. Post Office Department,* 397 U.S. 728 (1970); *Breard v. Alexandria,* 341 U.S. 622 (1951). To allow the decision of the court below to stand, would result in opening the homes of such traumatized and emotional individuals to the impersonal solicitation letters from any attorney

without regard to the needs of that individual. Certainly such letters do not aid in the important informational concerns of this court as expressed in *Bates,* when the Court therein permitted advertising by attorneys; in fact they lean more toward the impermissible solicitation of *Ohralik*.

Conclusion.

For the reasons stated herein, this Court should grant the petition for a writ of certiorari and summarily reverse the judgment below. In the alternative, certiorari should be granted and this case scheduled for plenary review.

Respectfully submitted,

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Decision of the Court of Appeals of the State of New York.

In the Matter of ERIC P. VON WIEGEN, an Attorney, Appellant. COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT, Respondent.

Argued September 6, 1984; decided October 16, 1984

SUMMARY

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 10, 1984, which suspended Eric P. von Wiegen from practice as an attorney in the State of New York for six months.

On April 20, 1982, petitioner, Committee on Professional Standards, Third Judicial Department, commenced a disciplinary proceeding against respondent attorney by filing charges alleging that he, in violation of section 479 of the Judiciary Law and the Code of Professional Responsibility, (I) engaged in direct mail solicitation of the victims and/or their families of the Hyatt Regency Hotel disaster in Kansas City, Missouri; (II) employed deception and misrepresentation in the letters sent to the accident victims by indicating that a litigation coordinating committee had been formed to assist the victims and that many victims or their families had retained respondent; and (III), in an unrelated incident, hired two persons to place flyers advertising respondent's services on automobile windshields in a shopping mall which contained misleading statements and a prohibited trade name — "The Country Lawyer". After a hearing, the referee rejected charges I and III in their entirety and sustained charge II insofar as it alleged that the references in the solicitation letter to a committee and to the fact that many victims had retained respondent were misleading. The Appellate Division confirmed the referee's report with respect to the finding of deception contained in charge II, determining that proof adduced at the hearing established by a fair preponderance of the evidence that two statements in the letters were deceptive and misleading; confirmed portions of charge III, and otherwise disaffirmed it, sustaining the trade name count thereof on the ground that the use of the phrase "The Country Lawyer" in the flyers violated DR 2-102 (B); sustained charge I, ruling that a prohibition on direct mail solicitation of accident

victims constituted a restriction on the time, place and manner of speech, rather than its content, which was permissible here because it related to and supported a variety of substantial State interests, and suspended respondent from the practice of law for six months.

The Court of Appeals modified the order of the Appellate Division by dismissing charge I and charge III and remitted the matter to the Appellate Division for reconsideration of the sanction imposed and, as so modified, affirmed, holding, in an opinion by Judge Simons, that the blanket prohibition of mail solicitation of accident victims violates respondent's rights of expression under the First and Fourteenth Amendments of the United States Constitution; that petitioner had presented sufficient evidence to support the allegations of deception contained in charge II, and that respondent's use of the phrase "The Country Lawyer" in flyers advertising his services did not constitute a violation of the prohibition against use of a trade name.

Matter of von Wiegen, 101 AD2d 627, modified.

HEADNOTES

Attorney and Client — Disciplinary Proceedings — Direct Mail Solicitation of Potential Clients

1. A charge that respondent attorney violated section 479 of the Judiciary Law and the Code of Professional Responsibility by engaging in direct mail solicitation of the victim's and/or their families of the Hyatt Regency Hotel disaster in Kansas City, Missouri, is dismissed. Inasmuch as the State seeks to regulate respondent's letter, not because of the involvement of third parties, but because of the subject matter of the communication — the fact that respondent seeks to be retained to represent accident victims and their families, the regulation is plainly content-based; accordingly, since the State cannot establish interests of sufficient magnitude to override the public's interest in receiving information on the availability of legal services and the danger of deception presented by the mailing may be controlled by the filing requirement, the blanket prohibition of mail solicitation of accident victims violates respondent's rights of expression under the First and Fourteenth Amendments of the United States Constitution.

Attorney and Client — Disciplinary Proceedings — Deception and Misrepresentation

2. Petitioner Committee on Professional Standards presented sufficient evidence to support allegations that respondent attorney employed deception and misrepresentation in letters mailed to victims and/or their families of the Hyatt Regency Hotel disaster in Kansas City, Missouri, seeking to be retained by them, which letters contained statements that a litigation coordinating committee had been formed to assist the victims and that many of the victims or their families had requested representation by respondent. Petitioner satisfied its burden of proof by introducing the letters themselves, which, when interpreted in a commonsense manner, contained two deceptive statements; testimony by recipients of the mailings was not necessary before the writing could be

found deceptive. Moreover, there was no need to establish that the letters actually mislead the recipients; it is the potential for deception which is significant.

Attorney and Client — Disciplinary Proceedings — Use of Trade Name

3. The use of the motto "The Country Lawyer" in flyers advertising respondent attorney's services did not constitute a violation of the prohibition against use of a trade name contained in DR 2-102 (B). Inasmuch as respondent's name was inserted apart from the motto, the use of the motto did not deceive the public about his identity, responsibility and status.

POINTS OF COUNSEL

Robert M. Cohen and *Arthur L. Rosen* for appellant. I. There is no evidence to support the charges that were sustained by the court below. (*Rochester Tel. Corp. v Green Is. Constr. Corp.*, 51 NY2d 788; *Matter of Capoccia*, 59 NY2d 549; *Matter of Sutton*, 70 AD2d 467, 49 NY2d 799; *Little v Streater*, 452 US 1; *Fedorenko v United States*, 449 US 490; *Addington v Texas*, 441 US 418; *Matter of R. M. J.*, 455 US 191.) II. It is unconstitutional to ban direct mail advertising to accident victims and their families. (*Matter of Koffler*, 51 NY2d 140; *Matter of Greene*, 54 NY2d 118; *Bates v State Bar of Ariz.*, 433 US 350; *Matter of R. M. J.*, 455 US 191; *Central Hudson Gas & Elec. v Public Serv. Comm.*, 447 US 557; *Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748; *Linmark Assoc. v Willingboro*, 431 US 85; *Ohralik v Ohio State Bar Assn.*, 436 US 447; *Bigelow v Virginia*, 421 US 809.) III. Appellant has not been using a trade name in violation of DR 2-102 (B), and if DR 2-102 (B) prohibits use of the motto employed by appellant, it is unconstitutional. (*Matter of Weinstock*, 40 NY2d 1; *New York Criminal & Civ. Cts. Bar Assn. v Jacoby*, 61 NY2d 130; *Bishop v Committee on Professional Ethics & Conduct*, 521 F Supp 1219; *Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748; *Bigelow v Virginia*, 421 US 809; *Friedman v Rogers*, 440 US 1.) IV. The sanction of suspension is not warranted on the facts of this case and must be vacated. (*Matter of Axtell*, 257 NY 210; *Matter of Hawes*, 217 NY 602; *Matter of Flannery*, 212 NY 610; *Matter of Kelly*, 23 NY2d 368; *Matter of Pell v Board of Educ.*, 34 NY2d 222; *Sniadach v Family Fin. Corp.*, 395 US 337; *Fuentes v Shevin*, 407 US 67; *Boddie v Connecticut*, 401 US 371; *Matter of Koffler*, 70 AD2d 252, 51 NY2d 140; *Matter of Greene*, 78 AD2d 131, 54 NY2d 118.)

Daniel J. Persing and *George B. Burke* for respondent. I. DR 2-103 and section 479 of the Judiciary Law provide a constitutional ban on direct mail solicitation of accident victims and their families. (*Central Hudson Gas & Elec. v Public Serv. Comm.*, 447 US 557; *Matter of Koffler*, 51 NY2d 140; *Bates v State Bar of Ariz.*, 433 US 350; *Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748; *Matter of R. M. J.*, 455 US 191; *Ohralik v Ohio State Bar Assn.*, 436 US 447; *Matter of Greene*, 54 NY2d 118; *Matter of Alessi*, 60 NY2d 229; *Matter of Primus*, 436 US 412; *Consolidated Edison Co. v Public Serv. Comm.*, 447 US 530.) II. There is sufficient evidence to support the charges sustained by the court below. (*Matter of Capoccia*, 59 NY2d 549; *Matter of R. M. J.*, 455 US 191.) III. Appellant has violated DR 2-102 (B) by using a trade name, a proscription which is constitutional. (*Friedman v Rogers*, 440 US 1; *Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748; *Bates v State Bar of Ariz.*, 433 US 350; *Matter of Shephard*, 92 AD2d 978.) IV. The sanction of suspension is not reviewable by this court on appeal. (*Erie County Water Auth. v Western N. Y. Water Co.*, 304 NY 342; *Matter of Robinson*, 209 NY 354; *Matter of Goodman*, 199 NY 143; *Matter of Axtell*, 257 NY 210; *Matter of Flannery*, 212 NY 610; *Matter of Cohen*, 9 AD2d 436, 7 NY2d 488, affd *sub nom. Cohen v Hurley*, 366 US 117, 374 US 857, 379 US 870; *Mildner v Gulotta*, 405 F Supp 182; *Matter of Koffler*, 51 NY2d 140; *Matter of Greene*, 54 NY2d 118; *Matter of Shephard*, 92 AD2d 978.)

OPINION OF THE COURT

Simons, J.

This is a lawyer disciplinary proceeding which has resulted in respondent's suspension from the practice of law for six months because he solicited by mail the victims and families of the 250 persons injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City, Missouri, in July, 1981, he did so by letters that were false and misleading and because, in unrelated advertising, he used a trade name. Respondent contends that the prohibition of direct mail solicitation abridges his constitutional right to free speech (*Bates v State Bar of Ariz.*, 433 US 350; *Matter of Koffler*, 51 NY2d 140; see, generally, Note, Direct

Mail Solicitation by Attorneys: *Bates* to *R.M.J.*, 33 Syracuse L Rev 1041; Goldblum, Regulation of Lawyer Advertising in New York, 56 NYSBJ, No. 4, May, 1984, p 6), that the evidence before the referee did not establish deception, that the motto he used did not constitute a trade name and that the penalty was excessive.

Respondent graduated from law school in 1974, was admitted to the Michigan Bar and practiced law there for approximately six years before moving to New York. In 1980 he was admitted to practice in this State and he presently maintains his law office in Schenectady. His practice consists principally of personal injury cases.

On April 20, 1982 petitioner, Committee on Professional Standards, Third Judicial Department, commenced a disciplinary proceeding against respondent by filing charges alleging that he, in violation of section 479 of the Judiciary Law and the Code of Professional Responsibility, (I) engaged in direct mail solicitation of the victims and/or their families of the Hyatt Regency Hotel disaster in Kansas City, Missouri (DR 2-103 [A], [C], [E]); (II) employed deception and misrepresentation in the letters sent to the accident victims by indicating that a litigation coordinating committee had been formed to assist the victims and that many victims or their families had retained respondent (DR 1-102 [A] [4], [6]; DR 2-101 [A], [B]); and (III), in an unrelated incident, hired two persons to place flyers advertising respondent's services on automobile windshields in a shopping mall in Schenectady which contained misleading statements and a prohibited trade name — "The Country Lawyer" (DR 2-101 [A], [C], [E]; DR 2-102 [A], [B]). (The letters and the flyer are annexed as an appendix to this opinion.) After a hearing the referee rejected charges I and III in their entirety and sustained charge II insofar as it alleged that the references in the solicitation letter to a committee and to the fact that many victims had retained respondent were misleading.[1] The referee rejected charge I, concluding that under this court's ruling in *Matter of*

1. The referee also found, although there was no charge to the effect, that respondent had violated subdivision (k) of section 806.15 of the department's rules (22 NYCRR) by failing to include his name on the initial letter sent to the disaster victims. Citing *Matter of Doherty* (28 AD2d 546), the Appellate Division concluded that the charge could not be sustained because it was not contained in the petition.

EDITOR'S NOTE

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Koffler (51 NY2d 140, *supra*), respondent's solicitation could be regulated but not proscribed by statute or disciplinary rule.

The Appellate Division confirmed the referee's report with respect to the finding of deception contained in charge II, confirmed portions of charge III,[2] and otherwise disaffirmed it. In sustaining charge I, the Appellate Division ruled that a prohibition on direct mail solicitation of accident victims constituted a restriction on the time, place and manner of speech, rather than its content (see *Matter of Greene*, 54 NY2d 118, 120-121, cert den *sub nom. Greene v Grievance Committee*, 455 US 1035), and noted that such a restriction is supportable if reasonable and related to a substantial State interest (citing *Matter of R. M. J.*, 455 US 191). The court found the ban permissible here because it "related to and supports a variety of substantial State interests, including avoidance of the demoralizing effect such solicitation might have on the profession and the unseemly rivalry reminiscent of 'ambulance chasing' it might generate * * * avoidance of stirring up litigation and vexatious conduct * * * and prevention of invasions of privacy" [citations omitted] (101 AD2d 627, 628). Addressing charge II, the court found that proof adduced at the hearing established by a fair preponderance of the evidence that two statements in the letters were deceptive and misleading. In sustaining the trade name count of charge III, it concluded that the use of the phrase "The Country Lawyer" in the flyers violated DR 2-102 (B). The court suspended respondent from the practice of law for six months.

[1, 2, 3] We agree generally with the determinations of the referee and we therefore modify the order of the Appellate Division by dismissing charges I and III and by affirming the determination on charge II.

I

The primary issue on appeal concerns respondent's right to solicit accident victims by mail. It can be analyzed in two

2. The Appellate Division confirmed the referee's rejection of petitioner's objection to the use of caricatures of Abraham Lincoln and George Washington on the flyer, characterizing them as "innocuous drawings". It also confirmed the referee's determination that the use of flyers does not, per se, constitute unconstitutional solicitation. The Grievance Committee has not appealed these determinations.

ways, by comparing the cases principally relied on by the Appellate Division and the referee and also by employing a structured constitutional analysis (see *Central Hudson Gas & Elec. v Public Serv. Comm.*, 447 US 557, 565) as we did in *Koffler*.

The Appellate Division, in sustaining charge I and banning direct mail advertising in personal injury cases, relied on *Ohralik v Ohio State Bar Assn.* (436 US 447). In *Ohralik* the Supreme Court held that the potential for fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct was so likely in the context of in-person solicitation of accident victims that a ban on such conduct was constitutionally justified. In *Matter of Koffler* (51 NY2d 140, *supra*), however, we found most of those concerns absent in the direct mail solicitation of real estate clients and held that the mail solicitation employed in that case was constitutionally protected commercial speech which the State may regulate but not proscribe. The question before us now is whether respondent's solicitation of accident victims and their families by mail implicates the substantial State interests identified in *Ohralik* (436 US 447, 462, *supra*) in a way which distinguishes it from *Matter of Koffler* and justifies proscription of such mailings.[3] Stated another way, is there something unique about lawyer mailings to accident victims as distinguished from similar mailings to prospective real estate clients which requires a result different from that reached in the *Koffler* case? From its analysis of *Ohralik*, the Appellate Division concluded that there was, that mail solicitation of accident victims was similar to in-person solicitation of them and posed a significant threat to the victims' ability to reach a reasoned and informed decision regarding the need for legal representation. That determination suggests that the validity of mailing restrictions depends upon the nature of the legal problem involved, whether it concerns torts or real estate, or some other area of the law.

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3. Only two State cases have been found which addressed the constitutional issues raised by the mail and in-person solicitation of potential tort plaintiffs (see *Matter of Appert*, 315 NW2d 204 [Minn] [which permitted mail solicitation]; and *Matter of Teichner*, 75 Ill 2d 88 [which permitted in-person solicitation of accident victims but also involved associational rights]).

[1] We view the present case as closer to *Koffler*, basing our decision on the distinction between mail solicitation and in-person solicitation of accident victims because the latter permits the exertion of subtle pressure and often demands an immediate response without providing an opportunity for comparison and reflection. The Supreme Court's decision in *Ohralik* was based on those factors, the elements of intimidation and duress (see *Ohralik*, 436 US 447, 462-463, 464-466, *supra*). They are not present in the case of mail solicitation and, as with the real estate client in *Koffler*, the process of decision-making may actually be aided by information contained in the mailing. For the reasons which follow, we find the restriction here is not related to the time, place and manner of expression but is content-based, and employing the analysis set forth by the Supreme Court in *Central Hudson Gas & Elec. v Public Serv. Comm.* (447 US 557, 566, *supra*), we hold the blanket prohibition of mail solicitation of accident victims violates respondent's rights of expression under the First and Fourteenth Amendments of the United States Constitution.

It is now familiar law that the Constitution protects from unwarranted governmental regulation, commercial expression, i.e., expression which relates solely to the economic interests of the speaker and his audience, because commercial expression not only serves the economic interest of the speaker but furthers a societal interest in the fullest possible dissemination of information (*Central Hudson Gas & Elec. v Public Serv. Comm.*, 447 US 557, 561-562, *supra; Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748, 762; *Bates v State Bar of Ariz.*, 433 US 350, 363-364, *supra;* see, also, Tribe, American Constitutional Law, § 12-15, pp 651-656). It is subject to a lesser degree of protection than other traditionally protected types of speech but it does, nevertheless, come within the ambit of the First and Fourteenth Amendments (*Ohralik v Ohio State Bar Assn.*, 436 US 447, 455-456, *supra*). Lawyer advertising represents commercial expression (*Bates v State Bar of Ariz., supra*). Thus, although the State, through its professional disciplinary committees, possesses broad power to regulate the legal profession because lawyers are essential to the primary governmental

function of administering justice and because they are officers of the court (*Matter of Primus*, 436 US 412, 422; *Goldfarb v Virginia State Bar*, 421 US 773, 792), the recognition that lawyer advertising is a form of commercial speech subject to First Amendment protection requires the courts to eschew blanket prohibitions of solicitation and to assess the validity of the regulation by carefully balancing the First Amendment interest at stake with the public interest allegedly served by the regulation. Categorizing the conduct as advertising or solicitation is of little help in that analysis (see *Bigelow v Virginia*, 421 US 809, 826; *Matter of Koffler*, 51 NY2d 140, 146-147, *supra*). Although some authorities have suggested that the degree of regulation permitted for commercial speech depends upon the type of speech involved, i.e., whether it contains explicit product and price information or less substantive matters (see Nowak-Rotunda-Young, Constitutional Law [2d ed], p 941), generally the degree of regulation permitted depends, as it does in all First Amendment cases, on the nature of the restriction, i.e., whether it is a restriction of the time, place and manner of expression (see *Consolidated Edison Co. v Public Serv. Comm.*, 447 US 530, 536; *Linmark Assoc. v Willingboro*, 431 US 85, 93) or of its subject matter or content (see *Erznoznik v City of Jacksonville*, 422 US 205) or whether the restriction is acceptable because it is narrowly tailored to serve a compelling State interest (see, e.g., *Lehman v City of Shaker Hgts.*, 418 US 298; *Kovacs v Cooper*, 336 US 77). On this appeal we are concerned with mail solicitation dealing principally with fees and available services and whether the restriction concerns the time, place and manner of solicitation or the subject matter of the mailing.

The State is permitted considerably more latitude in restricting the time, place and manner of speech than it is when it attempts to restrict content. Time, place and manner restriction are valid if reasonable and rationally related to legitimate State interests. Content or subject matter may be regulated only if substantial State interests are involved and then the regulation may go no further than necessary to serve that interest.

To be considered a time, place and manner restriction, the restriction must be "applicable to all speech irrespec-

tive of content" (*Erznoznik v City of Jacksonville*, 422 US 205, 209, *supra*; see, also, *Consolidated Edison Co. v Public Serv. Comm.*, 447 US 530, *supra*). The government may determine how, when or where speech is permitted, but it may only do so without reference to the subject matter or content of the speech. Thus, for example, the government may regulate large street demonstrations because held at rush hour or because amplifiers are used if the regulations are neutral in terms of content (see *Grayned v City of Rockford*, 408 US 104; *Cox v New Hampshire*, 312 US 569). It may not, however, prohibit the display of movies visible from a public street when the restrictions apply only to movies containing nudity (*Erznoznik v City of Jacksonville*, *supra*).

The Appellate Division, citing *Matter of Greene* (54 NY2d 118, *supra*), concluded that prohibition of direct mail solicitation of accident victims regulated the time, place and manner of speech because it focused upon the recipient group rather than the subject matter of the speech. *Matter of Greene* is distinguishable, however. That decision held that, to the extent section 479 of the Judiciary Law and DR 2-103 (A) of the Code of Professional Responsibility proscribes advertising of attorney's services by direct mail addressed to real estate brokers, those provisions are a constitutionally valid time, place and manner regulation of commercial speech (54 NY2d, at pp 120-121). A time, place and manner regulation was present because the proscription did not concern the content of the attorney's letter, i.e., making known to potential clients the availability of his services for real estate matters, but only prohibited the attorney from advertising in a particular manner — through a third party whose interests gave rise to potential conflicts of interest (*Matter of Greene*, *supra*, at pp 126-127). Here, the State seeks to regulate respondent's letter, not because of the involvement of third parties, but because of the subject matter of the communication — the fact that respondent seeks to be retained to represent accident victims and their families. As such, the regulation is plainly content-based (see *Bolger v Youngs Drug Prods.*, 463 US 60; *Consolidated Edison Co. v Public Serv. Comm.*, 447 US 530, 536, *supra*; *Erznoznik v City of Jacksonville*, 422 US 205, 209, *supra*; *Cox v Louisiana*, 379 US 536, 554).

Content-based restrictions are judged by a structured four-part analysis (*Central Hudson Gas & Elec. v Public Serv. Comm., supra*, at pp 557, 566; see, also, *Matter of Koffler*, 51 NY2d 140, 147, *supra*). The court must consider (1) whether the communication is outside the scope of constitutional protection — i.e., is it misleading or related to unlawful activity? (2) whether the government interests sought to be protected are substantial? (3) how directly the regulation advances those interests? and (4) whether there is a less restrictive alternative?

(1) *Is the Communication outside the scope of Constitutional Protection?* There is no constitutional right to disseminate false or misleading information or information about unlawful activity (*Central Hudson Gas & Elec. v Public Serv. Comm., supra*, at p 563). Petitioner contends, therefore, that permitting respondent to solicit business by mail notwithstanding the determination of the referee and the Appellate Division that portions of the communication were misleading, deprives it of its recognized power to prevent deceptive advertising. Our inquiry, however, is whether a particular *method* of advertising is inherently misleading. If a certain type of information can be presented in a way that is not deceptive, a State may not absolutely prohibit the method used because it is sometimes used to disseminate misleading information (*Matter of R. M. J.*, 455 US 191, 203, *supra*). Direct mail solicitation of accident victims is not inherently misleading nor is there a history that the practice has led to abuses. Thus, because information on the availability of legal services for accident victims may be communicated in a fair and understandable fashion, absolute prohibition is unwarranted (see, e.g., *Matter of Appert*, 315 NW2d 204 [Minn]).

(2) *What Substantial Governmental Interests are Protected?* At least four governmental interests can be identified in support of the outright ban on mail solicitation of accident victims: overcommercialization of the profession and the potential for "ambulance chasing"; invasion of privacy and the possibility of undue pressure; stirring up litigation; and the potential for deception.

The Appellate Division attempted to justify a ban on direct mail solicitation of accident victims as a measure

necessary to prevent overcommercialization and the potential for practices reminiscent of "ambulance chasing". In *Matter of Koffler* (51 NY2d, at p 149), we noted that overcommercialization is now controlled by the advertising standards set forth in DR 2-101. While lawyer advertising may appear unseemly to many members of the profession, particularly where, as here, it is directed at the unfortunate victims of a disaster or their families, it is constitutionally protected and serves the recognized purpose of informing those in need of the cost and availability of legal services (see *Bates v State Bar of Ariz.*, 433 US 350, 364, *supra*).

Furthermore, mail solicitation does not constitute a substantial invasion of privacy or present a risk of undue pressure. The simple answer to the claim that it does is that the recipient of a lawyer's letter "may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket" (*Consolidated Edison Co. v Public Serv. Comm.*, 447 US 530, 542, *supra; Matter of Koffler*, 51 NY2d 140, 149, *supra*). Nor is avoidance of the intrusion more difficult because the families of accident victims and the victims themselves may be emotionally upset when they receive a solicitation letter. As we noted in *Koffler*, it is not enough to justify a ban upon solicitation that in some situations, such as marital discord or a death in the family, the letter might be offensive (*supra*, at p 149). The same observation applies to accident victims and their families.

Unlike *Matter of Koffler* (*supra*), however, solicitation in personal injury cases does pose a danger that litigation will be stirred up. Historically, the Government has exhibited its strong interest in regulating this problem by the offenses of champerty and barratry and undoubtedly, frivolous litigation continues to result in unwarranted economic and societal costs today. Regulations which prevent or inhibit the stirring up of unwarranted litigation serve an important public purpose. Thus, the courts properly should limit uninvited communications from an attorney which instigate groundless lawsuits and neither further associational values protected by the First Amendment (see *Matter of Primus*, 436 US 412, *supra*) nor aid in the dissemination of truthful information about the availabil-

ity of legal relief to members of the public in need of such information (cf. *Matter of Teichner*, 75 Ill 2d 88). In this case, however, the victims and their families had evident need for legal counsel and the mail solicitation of them arguably performed an informational function which the State could not proscribe. As the Supreme Court has said, it is better to address such wrongs than to suffer in silence (see *Bates v State Bar of Ariz.*, 433 US 350, 364, 376, *supra*).

Finally, the potential for deception present in *Matter of Koffler* (*supra*) is also a genuine concern here because these mailings are not subject to the public scrutiny that a newspaper or television advertisement would receive (51 NY2d, at p 149). Moreover, many people may perceive a potentially greater incentive for deception in personal injury litigation than in other types of legal business because greater sums of money may be involved, the nature of the representation may be less routine, contingent fee arrangements may be employed, and because of past abuses in the area. These are serious concerns, but they are concerns which must be addressed whether the solicitation is in person or in writing and the potential for deception is not greater in mail solicitation. Indeed it may reasonably be contended that the use of writing and the filing requirement approved in *Koffler* helps sanitize statements made in the solicitation of personal injury cases.

(3) and (4) *How Directly Does the Regulation Advance the Identified Governmental Interests — Is there a Less Drastic Alternative?* A complete ban on the type of solicitation involved here would obviate any danger of deception. However, complete suppression is constitutionally impermissible because the less drastic alternative of filing the letters is present (*Matter of Koffler, supra,* at p 150).

In sum, the State cannot establish interests of sufficient magnitude to override the public's interest in receiving information on the availability of legal services and the danger of deception presented by the mailing may be controlled by the filing requirement.

II

Respondent next contends that petitioner failed to present sufficient evidence to support allegations of deception

contained in charge II because testimony by recipients of the mailings was necessary before the writing could be found deceptive.

[2] Petitioner was required to establish the charges by a fair preponderance of the evidence (*Matter of Capoccia*, 59 NY2d 549, 553). It satisfied that burden with respect to charge II by introducing the letters themselves, which, when interpreted in a commonsense manner, contain two deceptive statements: (1) that a litigation coordinating committee had been formed to assist the Hyatt Regency disaster victims; and (2) that many accident victims and/or their families had requested representation by respondent. The first statement is misleading because respondent and his former secretary were the sole members of the committee and the statement implies the existence of an entity independent of respondent. The second statement is deceptive because some, not many, families had contacted him, and none had in fact requested representation.

Respondent disputes these findings by adopting a hypertechnical analysis of the term "committee", as encompassing an organization with one member, and a liberal interpretation of "some and many" which minimizes any distinction between those two terms. There was ample support in the record for petitioner's interpretation and there was no need to establish that the letters actually mislead the recipients. It is the potential for deception which is significant (see *Ohralik v Ohio State Bar Assn.*, 436 US 447, 464, *supra*).

III

Finally, the Appellate Division concluded that the use of the phrase "The Country Lawyer" constituted a violation of the prohibition against use of a trade name contained in DR 2-102 (B).

[3] The purpose of the prohibition against trade names embodied in DR 2-102 (B) is to prevent the public from being deceived about the identity, responsibility and status of those who use the name (*Matter of Shannon*, 292 Ore 339; cf. *Friedman v Rogers*, 440 US 1 [use of trade names by optometrists]). The use of the motto "The Country Lawyer" in respondent's flyer did not deceive in that way

because the lawyer's name was inserted apart from the motto. The case relied upon by the Appellate Division, *Matter of Shephard* (92 AD2d 978), is distinguishable. In *Shephard*, the court found that the corporate name "The People's Law Firm of Jan L. Shephard, Attorney, P.C." constituted a trade name because it suggested that the firm was controlled by the public, received public funding or provided legal services on a nonprofit basis. No such potential for deception is present in the use of the term, "The Country Lawyer".

Accordingly, the order of the Appellate Division should be modified by dismissing charge I and charge III and the matter remitted to the Appellate Division, Third Department, for reconsideration of the sanction imposed, and, as so modified, affirmed, without costs.

Chief Judge COOKE and Judges JASEN, JONES, MEYER and KAYE concur; Judge WACHTLER taking no part.

Order modified and matter remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed, without costs.

Decision of the Appellate Division, Third Department.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

April 6, 1984

IN THE MATTER

OF

ERIC P. VONWIEGEN, Attorney,

Respondent.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

Petitioner moves to confirm in part and disaffirm in part a referee's report which rejected two charges of professional misconduct against respondent and sustained, in part, a third charge of professional misconduct. Respondent, an attorney admitted in this department on May 27, 1980 and who maintains a law office in the City of Schenectady, cross-moves to confirm in part and disaffirm in part the report.

The first charge against respondent alleges the direct mail solicitation of the victims and/or their families of the

Hyatt Regency disaster in Kansas City, Missouri, where more than 250 people were killed or injured when two skywalks collapsed in July, 1981. We find that the referee incorrectly concluded that such direct mail solicitation of accident victims was not prohibited by either DR 2-103 (subds [A], [C], [E]) of the Code of Professional Responsibility or section 479 of the Judiciary Law. Prohibition of direct mail solicitation of accident victims and/or their families constitutes regulation of the time, place and manner of attorney solicitation because the prohibition is directed towards the recipient group rather than the content of the commercial speech (see *Matter of Greene*, 54 NY2d 118, 120-121, cert den *sub nom. Greene v. Grievance Committee*, 455 US 1035). Such a restriction is permissible if reasonable and related to a substantial State interest (see *Matter of R.M.J.*, 455 US 191, ____, 102 S Ct 929, 936, n 13, 939; *Matter of Greene, supra*). A prohibition of direct mail solicitation of accident victims is related to and supports a variety of substantial State interests, including avoidance of the demoralizing effect such solicitation might have on the profession and the unseemly rivalry reminiscent of "ambulance chasing" it might generate (see *Bates v. State Bar of Ariz.*, 433 US 350, 400, n 10 [Powell, J., concurring in part and dissenting in part]); avoidance of stirring up litigation and vexatious conduct (see *Ohralik v. Ohio State Bar Assn.*, 436 US 447, 460-461); and prevention of invasions of privacy (see *Matter of Koffler*, 51 NY2d 140, 148-149, cert den *sub nom. Joint Bar Assn. Grievance Committee v. Koffler*, 450 US 1026). While we recognize that the Court of Appeals has found no invasion of privacy implicated by a direct mail solicitation because the recipient can throw the letter away (*Matter of Koffler, supra*), an unsolicited letter from a lawyer to the victim of an accident during the vulnerable recovery period thereafter constitutes an invasion of privacy no matter how

cavalierly one might believe some accident victims would treat such a notice. Indeed, direct mail solicitation of particular accident victims is closer to prohibitable in-person solicitation (see *Ohralik v. Ohio State Bar Assn., supra*) than to the direct mail advertising permitted by the Court of Appeals in *Matter of Koffler (supra)*. Finally, a prohibition of direct mail solicitation of accident victims is reasonable because a filing requirement (the most often cited alternative to a ban) cannot alter the objectionable nature of the conduct, diminish its potential for stirring up litigation or diminish its capacity to "vex" accident victims and/or their families or to invade their privacy. Respondent's contention that he was without notice that direct mail solicitation of accident victims is impermissible is rejected (see *Matter of Alessi*, 60 NY2d 229, 236, cert den ____ US ____, 52 USLW 3679).

The second charge against respondent alleges various instances of misrepresentation and puffery in the letters constituting respondent's direct mail solicitation of the Hyatt Regency disaster victims and/or their families. Because it is supported by a fair preponderance of the evidence and reasonable inferences to be drawn therefrom, we sustain the referee's finding that two statements in the letters were deceptive and misleading: (1) that a litigation coordinating committee had been formed to assist the Hyatt Regency disaster victims; and (2) that many accident victims and/or their families had requested representation by respondent. However, we conclude the referee erred in finding respondent guilty of violating subdivision (k) of section 806.15 of this department's rules by failing to include his name on the initial letter sent to the disaster victims. No charge corresponding to such a finding is contained in the petition; thus, it cannot be sustained (see *Matter of Doherty*, 28 AD2d 546).

The third charge, rejected entirely by the referee, accuses respondent of hiring two persons to place flyers

advertising respondent's services on automobile windshields in the parking lot of the Mohawk Mall in the City of Schenectady on September 26, 1981. Specifically objected to by petitioner is the use of the phrase "The Country Lawyer", albeit in conjunction with respondent's name, an offer to provide a free evaluation and consultation on any personal injury claim, and the use of a caricature of respondent positioned between caricatures of George Washington and Abraham Lincoln. We conclude, first, that the use of the phrase "The Country Lawyer" constituted a violation of the prohibition of DR 2-102 (subd [B]) against use of a trade name (see *Matter of Shephard*, 92 AD2d 978). Next, the referee properly rejected the objection to the use of the caricatures as casting reflection on the legal profession as a whole. While there may be a line between caricatures that are harmful to the profession and innocuous drawings, respondent has not crossed that line here. Finally, the referee correctly determined that the use of flyers does not, per se, constitute unconstitutional solicitation or advertising (see *Matter of R.M.J., supra*, p 939; *Bates v. State Bar of Ariz., supra*, p 402, n 12 [Powell, J., concurring in part and dissenting in part]).

Because we consider the direct mail solicitation of accident victims and the making of deceptive and misleading statements in such mailings serious misconduct, we have concluded that respondent should be suspended from the practice of law for a period of six months.

Respondent suspended for a period of six months, the date of commencement to be fixed in the order to be entered hereon.

Mahoney, P.J., Kane, Main, Casey and Weiss, JJ., concur.

Notices from Litigation Coordinating Committee.

LITIGATING COORDINATING COMMITTEE

406 STATE ST.

Schenectady, N.Y. 12305

ATTENTION HYATT REGENCY DISASTER VICTIMS

A Litigation coordinating committee has been formed to protect the rights and preserve the claims of all persons injured and the families of those deceased in the disaster of July 17, 1981.

An attorney has agreed to provide free legal consultation to assist any persons with questions as to their rights and possible claims arising from this incident.

If you have any questions concerning sources of income available such as social security disability and survivor benefits or questions pertaining to the probate of an estate, transfer of property or your claims against the hotel property owner and builder call collect (518) 842-6716 or (518) 382-0138 or drop a card to Diane Frost at the above address.

A committee person will be available to assist in the completing of and filing of documents obtaining accident reports, death certificates, to provide other assistance, information, and help obtain the services you need. This is a volunteer group and services provided by committee persons are free.

Initial reports released to the media by the hotel representatives imply the accident was the victim's fault. This is absurd. Your interest is not being represented by anyone at the accident site at this time. However, by

uniting together each persons claim can be preserved and results of any onesided investigation can be nullified.

Sincerely,

DIANE FROST
Committee Coordinator

ATTENTION HYATT REGENCY DISASTER VICTIMS

Many of you have requested representation by attorney Eric P. von Wiegen who volunteered initial FREE consultation concerning your claims against the Hyatt Regency, and others responsible for the death and injuries caused in this disaster.

He has agreed to represent victims or their surviving family members on a continent fee basis of twenty-five percent (25%) of the sum recovered, after the reimbursement of reasonable and necessary cost incurred in making the recovery. The cost will be pro-rated among those persons represented by Mr. von Weigen, and will be deducted from any sum recovered, before an attorney's fee is charged.

Because of Mr. von Wiegen's experience in the practice of personal injury litigation involving multiple defendants, and based upon conversations with potential experts, it is his opinion that the liability of the defendants is clear. His usual and customary attorney's fee in such instances is twenty-five percent (25%). However, he has advised us that should client representation exceed twenty-five persons, his fee shall be twenty percent (20%) to each client represented, and shall be charged as outlined above.

Mr. von Wiegen is an experienced personal injury attorney, licensed to practice in the states of New York and

Michigan. He has and does represent clients in many of the other states. If you wish to discuss this matter please call COLLECT 518-382-0438 8:30 a.m. to 5:30 p.m. EST, or COLLECT 518-842-6716, evenings to 11 p.m. and weekends.

Sincerely,

DIANE FROST
Committee Coordinator

Office-Supreme Court, U.S.
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NO. 84-1120

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Committee On Professional Standards,

Petitioner,

v.

Eric P. von Wiegen, Attorney,

Respondent.

On Petition For A Writ Of Certiorari To Review The Judgment Of The Court Of Appeals Of The State Of New York.

RESPONDENT'S BRIEF IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Committee On Professional Standards,

Petitioner,

v.

Eric P. von Wiegen, Attorney,

Respondent.

On Petition For A Writ Of Certiorari To Review The Judgment Of The Court Of Appeals Of The State Of New York.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Eric P. von Wiegen, Attorney, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the New York Court of Appeals opinion in this case. That opinion is reported at 63 N.Y. 2d 163 (1984).

REASONS WHY THE WRIT SHOULD BE DENIED

I

THE DECISION BELOW DOES NOT CONFLICT WITH OTHER STATES' DECISIONS.

The decision of the New York Court of Appeals is not in conflict with the decision of the highest courts of any other states. None of the cases cited by petitioners as creating a conflict among state courts of last resort (see Petition, at pp. 9-10) deal with direct mail solicitation of accident victims; those cases involve real property owners, persons arrested for driving while intoxicated, persons reported arrested in the newspapers, and clients of a former law firm, but no case cited by petitioners addresses direct mail solicitation of accident victims. In fact, the only decisions by a state court of last resort addressing the issue is in agreement with the Court of Appeals decision in von Wiegen that direct mail solicitation of potential personal injury plaintiffs is constitutionally permissible. Matter of Appert, 315 N.W. 2d 204 (Minn. 1981);

see also Matter of Teichner, 387 N.E. 2d 265 (Ill. 1979).

The highest courts of several states that have considered the issue are tending to accept the fundamental change permitting solicitation by attorneys and have approved direct mailings to potential clients. Woll vs. Attorney General 297 N.W. 2d 578 (Mich. 1980), on remand, 323 N.W. 2d 560 (Ct. App., Mich. 1982) (direct mail solicitation by attorneys protected commercial speech); Kentucky Bar Assn. vs. Stuart, 568 S.W. 2d 933 (Ky. 1978) (same).

Moreover, this case is not an appropriate vehicle for this Court to pass judgment upon Rule 7.3 of the proposed Model Rules of Professional Conduct of the American Bar Association. Rule 7.3 prohibits all direct mail solicitation by attorneys, and on its face Rule 7.3 would prohibit even the direct mailings approved in In re Primus, 436 U.S. 412 (1977). The constitutionality of Rule 7.3 should be decided in a concrete situation

where it has been adopted and applied to an attorney in a disciplinary proceeding by the highest court of a state.

II.

THE DECISION BELOW CORRECTLY INTERPRETS AND APPLIES THE PREVIOUS DECISIONS OF THIS COURT.

The New York Court of Appeals has properly applied the principles with respect to advertising by attorneys announced in cases previously decided by this Court and reached the correct result in this case. In Matter of Primus, supra, 436 U.S. 412, this Court held that direct mail solicitation of specific clients by attorneys, in behalf of a non-profit organization which pursued litigation as a vehicle for political expression and association, was protected by the First Amendment. In Ohralik vs. Ohio State Bar Assn., 436 U.S. 447 (1978), a restriction on in-person solicitation of accident victims while still in the hospital was sustained, based on the possibility of overreaching inherent in a person-to-person confrontation. In the Matter of R.M.J., 455 U.S. 191, 206 (1982),

upheld the right of an attorney to direct mail cards announcing the opening of his office to the general public as commercial speech protected by the First Amendment.

In Matter of Koffler, 51 N.Y. 2d 140 (1980), cert. den. 450 U.S. 1026 (1981), the New York Court of Appeals analyzed the above precedents announced by this Court including the four-part analysis of Central Hudson Gas vs. Public Service Commission, 447 U.S. 557 (1980). The Court of Appeals correctly concluded that direct mail solicitation by attorneys of a targeted group of clients, such as real property owners, was protected as commercial speech. The decision of the Court of Appeals in this case is simply corollary of its Koffler decision.

This Court has already articulated the principles to be applied by the state courts in deciding content based restrictions upon attorney advertising in Primus, Ohralik, R.M.J., and Central Hudson. Further guidance with respect to

newspaper advertisements aimed at a targeted group may be provided when this Court announces its decision in Zauderer vs. Office of Disciplinary Counsel, 461 N.E. 2d 883 (Ohio 1984), prob. jur. noted 53 U.S.L.W. 3235 (10/1/84), which was orally argued on January 7, 1985. Petitioners would encourage this Court to review one case for each possible permutation of restriction upon attorney advertisement by time, place and manner (in person, by mail, by a third party, in a newspaper, magazine, television, telephone book, on radio, billboard, etc.) and by content (general public, targeted groups, recent victims, not-so-recent victims, individuals, etc.). The highest courts of the states are capable of applying the existing precedents to the numerous permutations of factual situations, as illustrated by the New York Court of Appeals correct determination below.

III.

THIS CASE IS NOT AN APPROPRIATE VEHICLE TO DECIDE THE QUESTION PRESENTED.

This case is not an appropriate vehicle for resolution of the question presented, because of the interweaving of the constitutional issue with the finding of deceptive and misleading statements, which are not protected as commercial speech. Although the two issues are analytically distinct and were considered separately by the Court of Appeals, the petition mixes and confuses the two issues (see Petition, at pp. 7, 12-13), and it would be preferable for this Court to resolve the question presented in a case where no other issues are interjected.

IV.

THE DECISION BELOW IS NOT FINAL AND THE PETITION FOR A WRIT OF CERTIORARI IS PREMATURE.

The New York Court of Appeals ordered that this case be remitted to the Appellate Division, Third Department, for reconsideration of the sanction imposed. (See Petition, at p. 15a). The Appellate Division of the Supreme Court of the State of New York is an intermediate appellate court which has jurisdiction over matters of

attorney discipline in the State of New York pursuant to New York Judiciary Law 90. At the initial hearing before the referee appointed by the Appellate Division, Third Department, neither the petitioner committee nor the respondent presented any evidence by way of testimony or affidavits from any of the victims or family members of victims from Kansas City with whom respondent had spoken by telephone after the Hyatt disaster.

After the New York Court of Appeals remitted to the Appellate Division for reconsideration on the issue of sanction, petitioner made a timely motion for reargument or renewal on the merits to the Appellate Division, Third Department. The basis for this rehearing is, in part, affidavits from the three victims or family members of victims of the Hyatt disaster with whom respondent had the most communication. In the motion for reargument or renewal, it is argued that the first letter (see Petition, at p. 20a) was not a

solicitation of legal business for respondent, and the affidavits of the victims and family members confirm that in fact respondent did not solicit them to retain him, but respondent only provided them with information and answers to their questions about their legal rights. In addition, the affiants expressed their belief that they received helpful information and assistance from respondent, and that respondent had not been deceptive or misleading in his communications with them. Based on the affidavits, the motion for reargument or renewal also requests the Appellate Division to reverse on the merits the finding that the letters were deceptive or misleading. The Appellate Division, Third Department, heard oral argument on the issue of sanction and on the papers requesting rehearing on February 8, 1985, and a decision thereon is still pending.

As of the date of the brief in opposition herein, since a motion for reargument or renewal is pending in the New York courts, it is

respectfully submitted that the decision sought to be reviewed is not final within the meaning of 28 U.S.C. 1257 and that the petition for a writ of certiorari is premature. Chicago G.W.R. Co. vs. Basham, 249 U.S. 164 (1919).

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1984

COMMITTEE ON PROFESSIONAL STANDARDS,
Petitioner,

v.

ERIC P. VON WIEGEN, ATTORNEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984.

COMMITTEE ON PROFESSIONAL STANDARDS,

Petitioner,

v.

ERIC P. VON WIEGEN, ATTORNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF.

Statement.

The petitioner replies to respondent's argument that the petition for writ of certiorari is premature and submits the decision of the Court below on the issue for review was final and the petition was not premature.

Reasons Why Petition Should be Granted.

I.

The Decision Below is Final and the Petition for Writ of Certiorari was not Premature.

The New York Court of Appeals dismissed the charge relating to direct mail solicitation of accident victims. Although the respondent moved for reargument, the motion was untimely and without merit. (See decision of Appellate Division rendered February 15, 1985, made a part of the Appendix.)

At the time the petition was filed, the decision of the Court of Appeals was a final determination of the issue before this Court and remittitur was solely for reconsideration of the sanction for a separate issue. This Court has followed a pragmatic approach to the question of finality. The test is whether the appellate court has fully adjudicated the question and it is not subject to further review. *Department of Banking v. Pink,* 317 U. S. 264 (1942); *Market Street R. Co. v. Railroad Commission,* 324 U. S. 548 (1945). The fact that separate and unresolved issues are pending in the Court and subject to further proceedings does not render the judgment unfinal. When all that remains is the ministerial act of entering judgment on the remittitur, the judgment is final for purposes of Supreme Court review. *Hudson Distributors v. Eli Lilly & Co.,* 377 U. S. 386, 389, n. 4 (1964). A retrial on the question of punishment and not on the question of guilt renders the judgment final within the meaning of the jurisdictional parameters. *Brady v. State of Md.,* 373 U. S. 83 (1963).

There are no further proceedings possible in this action with regard to determining the right of direct mail solicita-

tion of accident victims. The judgment of the Court of Appeals with regard to the question sought to be reviewed cannot be changed on remittitur. *See, Barton Realty Corp. v. Mangan,* 25 A. D. 2d 730, 268 N. Y. S. 2d 869 (1st Dep't 1966).

Even if *arguendo,* the respondent's position were correct, the objection is rendered moot by the final determination of the Appellate Division imposing censure for the sole remaining charge. (See Appendix.)

Conclusion.

For the above-stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Decision of Appellate Division, Rendered February 15, 1985.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

February 15, 1985

IN THE MATTER

OF

ERIC P. VON WIEGEN, Attorney,

Respondent,

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

By decision dated April 6, 1984, this court suspended respondent from the practice of law for six months because he 1) solicited by mail the victims and families of the Hyatt Regency Hotel disaster in Kansas City, Missouri in July 1981, 2) made deceptive and misleading statements in the solicitation letters to the effect that a "litigation coordinating committee" had been formed to assist the disaster victims and that many accident victims and/or

their families had requested representation by respondent, and 3) used a trade name, i.e., "The Country Lawyer" (*Matter of von Wiegen,* 101 AD2d 627). Thereafter, the Court of Appeals stayed the suspension and subsequently modified this court's order by dismissing the charges with respect to direct mail solicitation and use of a trade name. The matter was remitted for reconsideration of the sanction to be imposed on the sustained charge of making deceptive and misleading statements in the solicitation letters (*Matter of von Wiegen,* 63 NY2d 163).

Respondent now moves for reargument or renewal of his original motion to disaffirm the referee's report with respect to the charge of making deceptive and misleading statements. In the alternative, he requests that this court impose no sanction with respect to such charge or, if a sanction is to be imposed, that it not involve a suspension from the practice of law. Initially, we deny the motion for reargument or renewal because, in light of the Court of Appeals decision, the former is untimely and without merit, and the latter is unsupported by assertions of fact which could not have been made at the time of the original motion to disaffirm (*see, e.g., Foley v. Roche,* 68 AD2d 558, 567-568).

With respect to the appropriate sanction, we first note that the use of deceptive and misleading statements in the solicitation letters constitutes serious misconduct which warrants imposition of a penalty. The Court of Appeals has confirmed this court's findings that respondent's communications were indeed deceptive in that 1) respondent and his secretary were the only members of the purported "litigation coordinating committee", and 2) only some, and not many, families had contacted respondent, and none had in fact requested representation (63 NY2d 163, 176). We strongly condemn respondent's conduct in the making of such misleading statements especially when it is

considered that they were directed to disaster victims and their families.

Inasmuch as the Court of Appeals has dismissed two of the three charges of unprofessional conduct underlying the six-month suspension initially imposed, and considering respondent's previously unblemished record, we conclude that a censure of respondent would now be an appropriate sanction.

Respondent censured.

Mahoney, P.J., Kane, Casey and Weiss, JJ., concur.